IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 9, 2009 Session

DAVID LEE COLE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Coffee County
No. 36,502 Charles Lee, Judge

No. M2008-02102-CCA-R3-PC - Filed September 22, 2009

The Petitioner, David Lee Cole, appeals as of right the Coffee County Circuit Court's denial of his petition for post-conviction relief. He argues that the denial was error because, prior to pleading guilty to two counts of aggravated sexual exploitation of a minor, two counts of incest, and two counts of statutory rape, he did not receive the effective assistance of counsel and, therefore, his pleas were entered involuntarily. As specific grounds for relief, he contends that trial counsel failed to properly investigate his case and prepare a defense strategy, trial counsel pressured him into pleading guilty, and trial counsel misinformed him about criteria for parole. Furthermore, the Petitioner contends that the State did not provide a sufficient factual basis to support his convictions. After the appointment of counsel and an evidentiary hearing, the post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence and denied the petition. Following our review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

Thompson G. Kirkpatrick, Manchester, Tennessee, for the appellant, David Lee Cole.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Mickey Layne, District Attorney General; and Jason Ponder, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case arises from allegations of sexual abuse by the Petitioner's fourteen-year-old daughter, which resulted in multiple charges against the Petitioner by a Coffee County grand jury:

three counts of especially aggravated sexual exploitation of a minor, three counts of aggravated sexual exploitation of a minor, three counts of incest, three counts of statutory rape, and three counts of rape. As a result of the numerous charges, the Petitioner pleaded nolo contendere on April 27, 2007, to two counts of aggravated sexual exploitation of a minor, two counts of incest, and two counts of statutory rape. See Tenn. Code Ann. §§ 39-13-506, -15-302, -17-1004. The remaining charges were dismissed. Pursuant to the terms of the plea agreement, the Petitioner received an effective eighteen-year sentence as a Range I, standard offender to be served in the Department of Correction.

At the plea acceptance hearing, the State recounted the facts supporting the Petitioner's pleas as follows:

> [The Petitioner], in January of 2004 and in the months surrounding January of 2004, engaged in three separate sexual acts with his biological daughter, who was 14 years of age at the time. There were photographs made of these events, which were seized by the Coffee County Sheriff's Department. [The Petitioner] did give a statement as to his guilt to the Coffee County Sheriff's Department as did his daughter.

During the hearing, the trial court spoke with the Petitioner regarding his trial rights, and the Petitioner responded appropriately to questions. The Petitioner affirmed that he had not been forced or coerced into pleading guilty. The Petitioner also stated that he had met with trial counsel numerous times. When asked if he had any complaints about trial counsel, the Petitioner responded, "Well he's a man with a lot of heart. I consider him as a friend. To answer your question, I think he represented me to my best interest." Trial counsel noted for the record that he had explained to the Petitioner, who had been in jail for almost three years at the time, that he received a Range I sentence, requiring 30% service before eligible for parole (5.4 years); he further elaborated "that doesn't necessarily mean he'd be released then. It means he is eligible . . . . Of course, that is up to the Department of Correction[]." At the conclusion of the hearing, the trial court accepted the plea agreement.

The Petitioner filed a petition for post-conviction relief on April 23, 2008. Counsel was appointed for the Petitioner.[1] While the petition is somewhat ambiguous, we discern three basic allegations by the Petitioner: (1) his plea was involuntarily entered because he was forced or coerced by his attorney into taking the plea agreement; (2) his conviction was based on a fabricated confession; and (3) trial counsel was ineffective in his representation. As grounds for ineffectiveness, the Petitioner contended that trial counsel failed to file pre-trial motions on his behalf, failed to interview witnesses, failed to investigate his case, and failed to challenge his confession. A hearing was held on July 17, 2008.

Trial counsel, the District Public Defender, testified that he represented the Petitioner during the pendency of his numerous charges. Trial counsel acknowledged that the Petitioner was arraigned

[1] No amended petition was filed.

in October 2004 but did not plead guilty until April 2007, and that the Petitioner was incarcerated during this entire time. According to trial counsel, the Petitioner desired to enter a nolo contendere plea "because he did not want to enter a guilty plea for the effect it might have on some of his family on down the line." Trial counsel testified that the Petitioner never desired a trial in this matter, always wanting to reach a plea agreement.

When asked if the Petitioner maintained his innocence during his pre-trial incarceration, trial counsel replied that he did to some of the charges but not to all of them; specifically, the Petitioner denied the incest charge and raping his daughter. Trial counsel confirmed that penetration was an element of the crime of statutory rape. At one point, the State offered a fifteen-year sentence, which required the Petitioner to plead to rape; the Petitioner refused to enter a plea to the charge. The Petitioner admitted to taking only one of the photographs of the victim engaged in sexual acts, even though the photographs were all found together under the steps of the house. It was noted that the facts given by the State supporting the Petitioner's pleas to aggravated sexual exploitation of a minor only said that "photographs were taken" but did not state that the Petitioner was the one who took them.

When asked if the Petitioner ever denied giving his confession to police, trial counsel responded that he did not deny confessing to the crimes. Trial counsel testified that the Petitioner never told him that he did not sign the confession.

Trial counsel confirmed that David Conn, a criminal investigator with the public defender's office, participated in the case and in discussions with the Petitioner. According to trial counsel, Mr. Conn may have talked about the plea bargain offer with the assistant district attorney general, but trial counsel was responsible for all negotiations.

Trial counsel advised the Petitioner that he was facing from 84 to 144 years if found guilty by a jury. Mr. Conn may have also tried to convince the Petitioner to enter into a plea agreement, informing the Petitioner that, if he did not do so, he was going to receive a much longer sentence.

According to trial counsel, he provided the Petitioner with all discovery materials, offering him copies on two occasions; however, the Petitioner did not want to take the file back into the jail with him. Trial counsel stated the Petitioner refused to look at the photographs.

Trial counsel affirmed that trial was set for April 30, 2007, and that he had not filed any motions or issued any subpoenas to witnesses prior to that time. Trial counsel recounted that he met with the Petitioner approximately fifteen times. According to trial counsel, the case was prolonged due to the Petitioner, who wanted the matter continued. Trial counsel adamantly denied pressuring the Defendant into pleading guilty, stating that the Petitioner was not ready to admit or deny his guilt in court. Motions were unnecessary in trial counsel's opinion. He had talked to officers who witnessed the Petitioner's confession and "to other people involved," and he had read their reports. According to trial counsel, the Petitioner admitted not telling the truth about some matters, and he later apologized to the officers and presumably told them the truth.

The Petitioner informed trial counsel that the victim was very sexually active and wanted the photographs taken. Trial counsel also talked with the Petitioner about witnesses who would testify "to the effect that [the victim] was out to get [the Petitioner] and may have even fabricated some of this." Trial counsel admitted that he did not interview these witnesses or issue subpoenas for any of them. Trial counsel explained that he did not pursue this information because the State had pictures of the victim engaged in sexual activity with the Defendant. He opined that evidence about the victim's sexual history would likely have been excluded by the rape shield law because it would not have exonerated the Defendant.

Regarding his advice about parole, trial counsel relayed that he informed the Petitioner that he would be eligible for release after 30% service but, in all probability, would not be released the first or second time he was eligible; the decision rested with the Department of Correction. Trial counsel advised the Petitioner that his actions in prison would have a great impact on his release date: he would probably be required to undergo counseling, and "he needed to better himself any way he could while he was in there . . . ."

On cross-examination by the State, trial counsel acknowledged that he told the Petitioner the judge in the case was known for ordering consecutive sentencing in child sex-offense cases and that the law allowed him to do so. The decision to plead guilty was "absolutely" the Petitioner's, and the Petitioner appeared to understand what was going on. While the Petitioner was uncertain at times, he never insisted on proceeding to trial and was never really interested in trying the case.

Investigator Conn testified that he also met with the Petitioner a number of times; he met with him alone two or three times. When asked if he interviewed any witnesses who might have been of help to the Petitioner's defense, Investigator Conn replied that he only interviewed Frank Watkins, one of the officers present when the Petitioner gave his statement. He did not conduct other interviews because "[t]he truth is the truth, whatever that might be." According to Investigator Conn, at his last meeting with the Petitioner a few days before trial, the Petitioner did not want to enter a plea and wanted to proceed to trial because he believed the offer being made was excessive. Investigator Conn belied the assertion that he pressured the Petitioner into pleading guilty.

The Petitioner testified that, in the weeks and months preceeding the trial, no one discussed any trial strategy with him or discussed coordinating any witnesses. The Petitioner stated that trial counsel never asked about the confession or sought to get it suppressed. According to the Petitioner, he never signed a confession, although his name appeared on such a document. The officer tried to get the Petitioner to endorse a legal pad with some notes on it, but the Petitioner refused.

The Petitioner testified that, toward the end of the proceedings, he felt pressured to plead guilty. During the months before his plea, he met with trial counsel about three times and Investigator Conn about three times. There was never any discussion about trial preparation or strategy, only dire warnings: "If you don't take the 18 years, they are going to give you 60." According to the Petitioner, he never had any intention to plead guilty.

When asked what he had learned about parole in the Department of Correction, the Petitioner replied that he was told "[t]here will be no parole." He did not have this information at the time he entered his plea and, if he had, he would have gone to trial. The Petitioner still protested his innocence.

On cross-examination, while the Petitioner could not recall signing a Miranda form waiving his rights, he affirmed that his signature "look[ed] to be" affixed to such a form. The Petitioner was then shown his purported confession given to Officer Watkins. Although his purported signature appeared on the document, the Petitioner claimed it was not his. The State entered these documents into evidence.

The Petitioner affirmed that trial counsel told him that would be parole eligible after 30% service, but he would not likely be released the first time. According to the Petitioner, trial counsel informed him that he would probably be released the second time. While trial counsel made no guarantees to the Petitioner, trial counsel said, "[D]ue to my past and as long as I keep my nose clean in the TDOC custody, . . . I should make parole no problem." Several people from jail, including a counselor, told him he would never be paroled; according to the Petitioner, no one convicted of a sex offense had made parole since 1982 or 1986. The Petitioner testified that the Department of Correction handbook stated that sex offenders do not get released on parole, but he could not produce such a document. When asked if he would not get released because he would not admit his guilt, the Petitioner replied that he did not know and that he would not admit to something he did not do. Finally, he stated that he was to have his first parole hearing in the next, upcoming month.

Upon questioning by the post-conviction court, the Petitioner's counsel stated that the parole board required certification from a psychiatrist or psychologist stating that there was no risk the individual would re-offend, "which is almost impossible to get . . . ." The post-conviction judge noted that "they probably can do that as a reasonable . . . exercise of their discretion, . . . but that is different than, there is no parole for these offenses." Counsel opined that it was the "functional equivalent." The judge replied that there are different concepts at play, "Now what the [P]etitioner is saying is, 'I didn't know it was going to be so hard,' which is different than, 'I'm not eligible, and I was misled, and I would have never pled.'" The judge relayed that for a plea to be voluntarily it is not necessary for every side effect of that plea to be explained: if "he didn't get the benefit of his bargain, that's one thing. . . . But if any promise was made or any information imparted . . . that he would be eligible, and the proof is that he was told that there [were] no guarantees . . . ."

The court then asked the Petitioner about the photographs. The Petitioner claimed that he did look at the pictures taken of the victim, but they "sickened [him] to [his] stomach to see such as that." He confirmed he took a picture of the victim, but stated that it was only of her in a bikini standing against a counter. He denied taking any of the pictures supporting the charges against him. The Petitioner acknowledged signing the plea agreement but claimed he did not read all of it. Despite his comments at the plea acceptance hearing, the Petitioner asserted that trial counsel did not represent him to his "best interest."

After hearing the evidence presented, the post-conviction court denied relief. The post-conviction court ruled that the Petitioner had not satisfied his burden of proving that trial counsel was ineffective, thus crediting the testimony of trial counsel. The post-conviction court further determined that there was no indiction the Petitioner was under any undue pressure to plead guilty; there were no promises made to the Petitioner that he would be released at any particular time. An order was entered to this effect on August 1, 2008. This appeal followed.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in denying him relief because: (1) trial counsel failed to investigate his case and prepare for trial, thus "entering a plea became his only option[;]" (2) his plea was involuntary due to pressure from trial counsel and Investigator Conn to plead guilty and trial counsel's failure to advise him that he would have to be evaluated by a psychiatrist or psychologist before he could be paroled; and (3) there was an insufficient factual basis presented for his pleas, penetration being an element of statutory rape and incest and no statement being made that the Petitioner was the one who took the photographs.[2] To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the

[2] While the post-conviction court did not specifically rule on this issue and it was not stated in the petition for post-conviction relief, the Petitioner did provide testimony challenging the factual basis supporting his pleas at the post-conviction hearing.

burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. Hill v. Lockhart, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970)).

When a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered,

a trial court must "canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s]." Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, "(a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea." Mackey, 553 S.W.2d at 341.

However, a trial court's failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to seek post-conviction relief. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specified constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). "Whether the additional requirements of Mackey were met is not a constitutional issue and cannot be asserted collaterally." Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

Here, the Petitioner claims that his plea was not knowingly and voluntarily made because of deficiencies in trial counsel's investigation and preparation of his case. He also claims that he was under duress from trial counsel and Investigator Conn when he entered his pleas and that he was not advised of certain parole criteria.

The post-conviction court obviously did not accredit the testimony of the Petitioner. Trial counsel testified that the Petitioner always wanted to plead guilty, desiring to avoid a trial due to family concerns. The Petitioner never told trial counsel that the signature on the confession was not genuine. Trial counsel was unaware of any grounds on which to seek suppression of his statements. Trial counsel testified to many meetings with the Petitioner and to reviewing discovery with him. He did not subpoena witnesses because he had seen the witness' statements provided by the State, and the Petitioner did not present any witnesses at the post-conviction hearing to support a viable defense strategy. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). According to trial counsel, the Petitioner admitted to taking one of the photographs in the State's file. Trial counsel did not seek evidence of the victim's sexual history, opining that it likely would have been excluded by the rape shield law. Both trial counsel and Investigator Conn testified that they did not exert any undue pressure on the Petitioner; he was simply informed of the likelihood of a much longer sentence if he went to trial.

Trial counsel testified that he advised the Petitioner that parole eligibility did not guarantee release and that he probably would not be paroled the first or second time. The Petitioner made a

bald, unsupported assertion that he would not ever be paroled because he was a sex offender, per a Department of Correction policy. The Petitioner was correctly advised that he would be eligible for parole after completing 30% of sentence, and the requirement of a mental health professional's evaluation did not effect his parole eligibility. As noted by the post-conviction court, there is a difference between not knowing "it was going to be so hard" to get paroled versus simply not being eligible for parole. Trial counsel's failure to inform him of the certification required for release does not render his plea unknowing or involuntary. See Jaco v. State, 120 S.W.3d 828, 831-33 (Tenn. 2003).

In this case, the trial judge did advise and question the Petitioner as mandated by Mackey. The guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions. The Petitioner was asked if he had any complaints about trial counsel, and he answered in the negative. In fact, he praised trial counsel. The Petitioner also affirmed that he had not been forced or coerced into pleading guilty. The record reflects that the Petitioner knew and understood the options available to him prior to the entry of his guilty pleas including the right to plead not guilty and demand a jury trial, and he freely made an informed decision of that course which was most palatable to him at the time.

Additionally, regardless of any potential waiver of the issue, this Court has previously determined that lack of a factual basis for a guilty plea is not a basis for post-conviction relief. See, e.g., Powers v. State, 942 S.W.2d 551, 555 (Tenn. Crim. App. 1996). The State is not even required to put forth a factual basis for a plea of nolo contendere. See State v. Crowe, 168 S.W.3d 731, 747 (Tenn. 2005). Moreover, any failure to establish a sufficient factual basis for the plea did not contribute in any significant way to the Petitioner's decision to plead guilty.

The Petitioner has failed to show that trial counsel did not adequately investigate his case or advise him as to his pleas or that he was unduly pressured into pleading guilty. The evidence does not preponderate against the findings of the post-conviction court. In consequence, the Petitioner has failed to establish that his guilty plea was not knowing and voluntary and that he was denied the effective assistance of counsel.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court did not err by denying post-conviction relief. Accordingly, we affirm the judgment of the Coffee County Circuit Court.

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DAVID H. WELLES, JUDGE